No. 89-1139

(2)

Supreme Court, U.S.
FILED
FEB 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LOCAL 827, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Petitioner,

v.

EDNA TRAD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 89-1139

IN THE

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OCTOBER TERM, 1989

LOCAL 827, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Petitioner,

v.

EDNA TRAD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, respondents Edna Trad, Marjorie E. Simms and John T. Dixon file this opposition to the petition for a writ of certiorari filed by Local 827, International Brotherhood of Electrical Workers ("Local 827").

OPINIONS BELOW

In addition to the reports of opinions referenced in the petition, the first order of the Supreme Court of New Jersey denying certification, dated May 24, 1988, is report-

ed at 546 A.2d 516 (Petitioner's Appendix ("Pet. App.") at 12a-13a); the opinion of the Superior Court of New Jersey, Appellate Division, dated March 11, 1988, is reported at 223 N.J. Super. 561, 593 A.2d 316 (Pet. App. at 14a-26a).

JURISDICTION

This Court does not have jurisdiction under 28 U.S.C. §§ 1257 and 2101(c). Final judgment was entered on the question presented more than ninety days prior to the filing of the petition, and no federal question was determined by this later judgment from which certiorari is sought.

COUNTERSTATEMENT OF THE CASE

Local 827, in its Statement of the Case, attempts to finesse the fact that this is the second time it has tried to place the "question presented" before this Court. Local 827 attempted to file, on August 24, 1988, a petition presenting the very same issue for consideration on certiorari to the New Jersey Supreme Court from its order denying certification on May 24, 1988. *See* Appendix A, *infra* at 1a-47a. That petition was not docketed by the Clerk of this Court, because it was submitted outside the time limits prescribed by the Court's Rules. Appendix B, *infra* at 48a-49a.

Furthermore, this case does not involve a "claim by three employees of New Jersey Bell Telephone Company" (Petition ("Pet.") at 4), but rather involves a breach of contract action filed in a New Jersey state court by Local 827, seeking to enforce union discipline against three employees of New Jersey Bell Telephone Company (Pet.

App. at 15a). The action relates to Local 827's strike against New Jersey Bell in August 1983 (Pet. App. at 16a).

Respondents Trad, Dixon and Simms ("the employees") expressed their desire *not* to support the strike and specifically asked officials of Local 827 how they could resign from membership. They were informed by Local 827, as they had been previously, that they had to be members as a condition of employment. Based on this information, the employees returned to work without first resigning from the Union (Pet. App. at 15a-16a).

In September 1983, the three employees were charged by Local 827 with violating union rules against working during a strike. Local 827 held a "trial" and fined the employees in amounts which approximated the money (after taxes) they earned during the strike (Pet. App. at 16a).

The Union then filed a state court breach of contract action seeking judicial enforcement of its internal discipline (Pet. App. at 16a). After a two-day trial, the Superior Court, by letter opinion, ruled in favor of Local 827. The court refused to consider defenses raised by the employees regarding the coercion and misrepresentations perpetrated by Local 827, holding that it was without jurisdiction because the defenses were preempted by federal labor law (Pet. App. at 33a-35a).

The employees appealed to the New Jersey Appellate Division, and on March 11, 1988, it reversed the trial court, holding that there was state jurisdiction to consider the defenses raised by the defendants and remanding the matter to the trial court (Pet. App. at 14a-26a). The New Jersey Supreme Court refused to certify that question for appeal on May 24, 1988 (Pet. App. at 12a-13a). Local 827's attempt to place the question before this Court on

August 24, 1988, was unsuccessful due to its failure to file its petition on time. *See* Appendices A and B, *infra*.

On remand, the trial court credited the testimony of all three employees and entered judgment in their favor (Pet. App. at 5a-11a). Local 827 again appealed to the New Jersey Appellate Division. Local 827's attempt to relitigate the first appeal was denied based upon "law of the case" considerations (Pet. App. at 4a). The appeals court found no merit in the union's contention that the trial court's factual determinations were not supported by the record (Pet. App. at 3a-4a). A subsequent petition by Local 827 to the New Jersey Supreme Court was again unsuccessful (Pet. App. at 1a).

REASONS FOR DENYING THE WRIT

A. THE UNTIMELY FILING OF THE PETITION DEPRIVES THIS COURT OF JURISDICTION OVER THE QUESTION PRESENTED.

As noted in the "Counterstatement of the Case," *supra*, this Court is confronted with a petition that was previously submitted to it for consideration out of time. The initial petition of August 24, 1988, was refused by the Clerk of the Supreme Court because it was filed out of time. Pursuant to Rule 13.3 of this Court, the "Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time." Certiorari cannot be granted now because the question presented became *res judicata* in 1988, and this Court has no jurisdiction to grant certiorari at this late date.

Even the most cursory comparison of the petition filed on August 24, 1988 (Appendix A, *infra*) with the instant petition reveals that the *very* same cause of action, the *very* same matter litigated, the *very* same issue, the *very* same

record relevant to the questions essential to the controversy, and, the *very* same parties are once again before the Court.[1] Since, through its untimely filing of the initial petition, Local 827 allowed the state court's determination of the question presented to remain final without review by this Court, the whole matter presented by this petition is *res judicata*.

By statute, Supreme Court review of state court decisions is available only with respect to "[f]inal judgments or decrees." 28 U.S.C. § 1257. In *Belknap v. Hale*, 463 U.S. 491, 497-98 n.5 (1983), this Court held final and reviewable a state court determination that state causes of action in a labor dispute were not preempted by federal labor laws and that trial on the merits of the case should proceed in the state trial court. *Belknap* is conclusive as to the finality of the New Jersey Appellate Division's decision on the first appeal in this matter, that the federal labor laws did not preempt the defense that no valid membership contract existed due to the union's misrepresentations. This judgment of the Appellate Division became final on May 24, 1988, when certification was denied by the New Jersey Supreme Court (Pet. App. at 12a-13a). Local 827's untimely attempt to file a petition for a writ of certiorari in 1988, raising the identical preemption issue that it now presents, shows that it knew the judgment on the preemption issue was final then.

This Court has consistently applied *res judicata* and the related doctrine of collateral estoppel to causes of action and issues decided by state courts. *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Montana v. United States*, 440 U.S. 147 (1970). It has repeatedly emphasized the importance of these doctrines in fulfilling the purpose for

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[1]Actually, the very same *petition*, with a few editorial changes, has been resubmitted to the Court.

which civil courts are established, i.e., the conclusive resolution of disputes within their jurisdiction. Under the doctrine of *res judicata*, the petitioner is precluded from relitigating issues that were or could have been raised in this action. *Allen v. McCurry*, 449 U.S. at 94. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

The purpose of both doctrines is to preclude repeated controversy over matters judicially determined. *Southern Pacific R.R. v. United States*, 168 U.S. 1 (1897). They are reasonable measures calculated to save individuals and courts from the waste and burden of relitigating old issues. As was explained in *Parklane Hosiery Co. v. Shore*,

> [c]ollateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.

439 U.S. at 326 (citing *Blonder-Tongue Laboratories v. University of Illinois Found.*, 402 U.S. 313, 328-29 (1971)).

Local 827 had a full and fair opportunity in 1988 to ask this Court to consider the question it now presents in this case, but waived it by failing to meet this Court's strict docketing requirements. It is respectfully submitted that the Clerk of the Supreme Court should have rejected this petition as well based upon Supreme Court Rule 13.3. A writ of certiorari in a civil case must be applied for within ninety days after entry of the judgment with regard to which review is sought. 28 U.S.C. § 2101(c). This requirement of timeliness is jurisdictional and cannot be waived in a civil case. *Department of Banking v. Pink*, 317 U.S.

264, 268 (1942); *see, e.g., Deal v. Cincinnati Bd. of Educ.*, 402 U.S. 962 (1971).

The final judgment which determined the question presented by this petition was *res judicata* in August 1988. Having slumbered on its responsibility to present the question in a timely manner, Local 827 should not now be permitted to force the employees to relitigate an issue which was finally adjudicated more than ninety days ago. Because "the question sought to be presented arises upon the first judgment—it being final in the sense of [the applicable section of the Judicial Code]—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here." *Rio Grande W. Ry. v. Stringham*, 239 U.S. 44, 47 (1915).

B. THIS COURT HAS HELD THAT STATE COURTS HAVE JURISDICTION OVER ENFORCEMENT OF INTERNAL UNION DISCIPLINE, AND THUS, THE ONLY ISSUES DETERMINED BY THE JUDGMENT AS TO WHICH THE PETITION IS TIMELY ARE MATTERS OF STATE LAW AND FACT.

Any discussion of union discipline must begin with the premise that a labor organization may only take disciplinary action against its *voluntary members*. *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*, 409 U.S. 213 (1972). Because of the inherent inequality in the relationship between a union and its members, the courts have long been concerned with the right of a union to fine its members. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). The sanctioning of union-imposed fines is expressly conditioned on a member's *voluntarily* undertaking the obligations of full-fledged union membership.

The only issues that Local 827 is not barred from raising on the instant petition are whether the state courts correctly found on remand that the employees proved their

state-law defense of no valid membership contract due to misrepresentation. *See* Pet. App. B at 3a. These are questions of state law, *see NLRB v. Boeing Co.*, 412 U.S. 67, 74-76 (1973), over which 28 U.S.C. § 1257 grants the Supreme Court no jurisdiction.

Boeing, 412 U.S. at 74 (emphasis added), explicitly recognized that suits concerning the enforcement of union discipline present issues that are solely matters of state law:

> Issues as to the reasonableness or unreasonableness of such fines must be decided upon the basis of the law of contracts, voluntary associations, or such other principles of law as may be applied in a forum competent to adjudicate the issue. Under our holding, *state courts* will be wholly free to apply *state law* to such issues *at the suit of either the union or the member fined.*

The specific question in this case was whether the relationship of formal union membership existed and was enforceable under New Jersey law. *See* Pet. App. at 20a-26a. *Boeing*, 412 U.S. at 75-76 (emphasis added) (citations omitted), also explicitly recognized that that relationship "is generally viewed as contractual in nature, and the *local* law of contracts or voluntary associations usually governs the enforcement of this relationship."[2]

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[2]From *Boeing*, it is not only clear that state courts have power to consider contractual issues raised in suits for enforcement of union discipline, it also follows that the union behavior thus regulated by the state courts "is behavior that . . . touches interests deeply rooted in local feeling and responsibility." *Belknap*, 463 U.S. at 498. Consequently state determination of those issues is not preempted by the NLRA. If this Court were not barred by lack of jurisdiction, we would urge it summarily to affirm, under Supreme Court Rule 16.1, the judgment of the New Jersey Appellate Division that the employees' contractual defenses were not preempted. The conflicts which Local 827 perceives between this case and *CWA, Local 5900 v. Bridgett*, 512 N.E.2d 195 (Ind. Ct. App. 1987), **[note cont'd on p. 9]**

Moreover, the only issue not determined on the first appeal which Local 827 raised in the Appellate Division on the second was its contention "that the trial court's factual determinations were not supported by the weight of the evidence" (Pet. App. at 3a). Whether there was sufficient evidence to support the trial court's findings that Local 827 misrepresented the nature of the employees' membership obligations, and that the employees would not have been full members if there had not been misrepresentation, are only questions of fact. This Court does not grant certiorari merely to review a decision of a state court on a question of fact. *Grayson v. Harris*, 267 U.S. 352, 358 (1925).

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on the one hand, and *Teamsters Local 302 v. Vevoda*, 772 F.2d 530 (9th Cir. 1985), *cert. denied*, 475 U.S. 1036 (1986), on the other, exist only because *Vevoda* is erroneous and contrary to *Boeing*. That *Vevoda* alone conflicts with all other decisions on the preemption question presents no reason for granting plenary review here.

CONCLUSION

For the foregoing reasons, this Court should:

1) Order the Clerk of the Supreme Court to reject the petition pursuant to Supreme Court Rule 13.3; or

2) deny the petition; and,

3) because the petition is a knowing attempt to resubmit a previous petition filed outside the time limits, award respondents just damages and double costs pursuant to Supreme Court Rule 42.2.

Respectfully submitted,

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APPENDICES

APPENDIX A

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

August 24, 1988

No.

In The

Supreme Court of the United States

October Term, 1988

LOCAL 827, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Petitioner,

vs.

EDNA TRAD, JOHN T. DIXON and MARJORIE E. SIMMS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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QUESTIONS PRESENTED

May a state trial court with jurisdiction to enforce fines imposed pursuant to union constitution and bylaws for violation of strike rules properly exercise jurisdiction to consider and determine affirmative defenses that constitute union unfair labor practices that fall within the exclusive jurisdiction of the National Labor Relations Board.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Local 827. International Brotherhood of Electrical Workers and the Respondents, Edna Trad, John T. Dixon and Marjorie E. Simms.

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No.

In The

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October Term, 1988

LOCAL 827, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Petitioner,

vs.

EDNA TRAD, JOHN T. DIXON AND MARJORIE E. SIMMS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The Petitioner, Local 827, International Brotherhood of Electrical Workers respectfully prays for a writ of certiorari to review the judgment of the New Jersey Supreme Court, entered in the above entitled proceeding on May 25, 1988.

OPINIONS BELOW

The New Jersey Supreme Court decision was not contained in any opinion, and, thus, has not been reported. It is reprinted in the appendix hereto, 5a, *infra*.

The opinion of the Superior Court of New Jersey, Law Division, Special Civil Part, Ocean County (Campbell J.S.C.) has not been reported. It and the original judgment entered by the trial court are reprinted in the appendix hereto, 24a and *infra*. 27a respectively, *infra*. An order was entered nunc pro tunc dismissing the counterclaims. (21a). A subsequent opinion and decision, following remand to the trial court, has been delivered to the parties, but a judgment conforming to same has not been entered as of this date. (No appeal of this latest factual determination can be filed until after a judgment has been entered.) This latest opinion is reprinted in the appendix hereto, 1a *infra*.

The Appellate Division, Superior Court of New Jersey, opinion is reprinted in the appendix, 7a *infra*, and is reported in 223 *N.J. Super.* 561 (App. Div. 1988).

JURISDICTION

The Petitioner brought this suit in the Superior Court of New Jersey, Law Division. On October 6, 1986, the Law Division entered judgment in favor of Petitioner in the amount of $3020.40 plus interest and costs of suit collectively against the defendants and found, further, that the Court lacked jurisdiction to consider the defenses proffered by the defendants by virtue of the doctrine of primary jurisdiction, which recognizes the intent of Congress to have matters of national labor policy decided in the first instance by the National Labor Relations Board (hereinafter referred to as NLRB). 24a-29a.

On respondent's appeal, the Appellate Division of the Superior Court of New Jersey reversed the trial court and remanded the case for fact-finding on the defenses raised by the defendants. 7a through 20a.

On the Petition for Certification to the New Jersey Supreme Court by the Petitioner, the decision of the Appellate Division was affirmed without opinion. 5a.

The jurisdiction of this Court to review the judgment of the New Jersey Supreme Court is invoked under 28 U.S.C. § 1257(3). A substantial federal question has been properly raised in the trial and appellate court proceedings and heard and determined by the courts below.

STATUTES INVOLVED

National Labor Relations Act

Section 7, NLRA; 29 U.S.C. § 157:

> Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Section 8 (b) (1). NLRA; 29 U.S.C. § 158 (b) (1):

> (b) it shall be an unfair labor practice for a labor organization or its agents-
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

STATEMENT OF THE CASE

The instant matter involves the construction and application of federal law under 29 U.S.C. §§ 157 and 158(b)(1) and the conflicting federal and state case law interpreting these provisions. The federal question sought to be reviewed was initially raised by Petitioner in the first instance to the trial court and was reflected in the court's decision. (27a).

This litigation is based upon a claim by three employees of New Jersey Bell Telephone Company that the fines imposed on them by their union, Local 827, International Brotherhood of Electrical Workers, for breaking strike rules approved by the union were invalid because the union violated an affirmative duty to advise them of their right to resign from union membership and, additionally, affirmatively and constructively prevented them from resigning. These employees complained that the union had engaged in a continual and consistent pattern of harassment and intimidation against them for the sole purpose of insuring strict obedience to union decisions. The trial judge, following a two

day trial, and following legal arguments by counsel, held that the court lacked jurisdiction to consider the defenses asserted by the employees because those defenses were solely within the jurisdiction of the NLRB. The court held that the fines were recognized by New Jersey law and sustained their imposition. No procedural defects were claimed by the employees in the manner in which the fines were imposed. 27a-28a.

The substantial federal question heard by all courts below and presently before this Court is whether the defenses presented by the employees arise from conduct regulated by sections 7 and 8(b)(1) of the National Labor Relations Act (hereinafter referred to as NLRA or the Act) and, as such, fall outside the jurisdiction of the courts (except the federal courts on review).

The Appellate Division of the New Jersey Superior Court, contrary to the ruling by the trial court, concluded that the doctrine of primary jurisdiction did not preclude the state court from entertaining the defense that the employees were involuntarily required to become or remain members in the union. The Appellate Division concluded that if the union sought to enforce the fine in the courts of New Jersey in circumstances where the employees asserted involuntary membership allegedly flowing from misrepresentations relating to their obligation to remain in the union, the defense had to be considered on the merits. The petitioner union takes issue with such conclusion, contending both that the allegations, if true, still would fall within the exclusive unfair labor practice jurisdiction of the NLRB pursuant to the Act and that the failure of the employees to timely challenge before the NLRB whatever actions underpined the argument of involuntary membership precluded their raising as a defense in this action what could not be presented any longer in a complaint to the NLRB.

The same federal question sought to be reviewed now was raised by Petitioner in its Petition for Certification, which was denied by the New Jersey Supreme Court. 5a.

The apparent conflict between the Ninth Circuit Court of Appeals in *Milk Drivers and Dairy Employees Union v. Vevoda*, 772 *F. 2d* 530 (9th Cir. 1985) *cert. den.* 475 *U.S.* 1036, 106 *S. Ct.* 1246 (1986) and the Indiana state court in *Communications Workers of America, Local 5900 v. Bridgett*, 512 *N.E. 2d* 195 (Ind. Ct. App., 1st Dist. 1987) as well as this matter presents a significant and novel federal question and justifies the granting of the petition for certiorari in conformity with the standards of this Court.

The petitioner union believes that in these times of unsettled labor-management and employee-union relations, the opportunity for similar conflicts has been expanding, and for that reason the time is now appropriate to elevate the issue central to this appeal to the highest judicial forum of the land in order to establish clear guidance in the future as to the time frame applicable to resolution of employee allegations concerning involuntary membership as well as the tribunals to whom such complaints may be directed.

REASONS FOR GRANTING THE WRIT

The New Jersey Supreme Court and Indiana Court of Appeals Abrogation of the Pre-Emption Doctrine (A) have extended their jurisdiction to hear defenses that constitute unfair labor practices identical with those that should be presented only to the National Labor Relations Board in clear contravention of the National Labor Relations Act and (B) conflicts with decisions of this Court and other Circuit and State Courts.

Without, and, Petitioner suggests, in the face of congressional authorization, the New Jersey Supreme Court (by letting stand the Appellate Division opinion) in the instant matter and the Indiana First District Court of Appeals in *Communications Workers of America, Local 5900 v. Bridgett, supra,* have carved out an exception to the exclusive jurisdiction of the NLRB in order to protect what concededly are perceived state interests (*i.e.*, the right of state citizens to present affirmative defenses to state court complaints even though independently they would fall within the federally reserved territory of the NLRB.) Essentially, these state appellate courts have eroded the statutory mandate enjoyed by the NLRB, thus, frustrating the federal scheme intended by Congress in the field of labor relations.

The most obvious need for a review by this Court occurs with respect to the application of general principles of pre-emption and abstention to the specific circumstances herein. Petitioner contends that conflict between the state court decisions rendered in this matter and in *Communication Workers of America, supra,* and *Milk Drivers, supra,* must be resolved in favor of the federal court construction of federal law, especially to protect against state courts engaging in the formulation of a parallel body of labor law (whether conflicting or not).

A danger presented by the action of the state appellate courts below and in *Communication Workers of America, supra,* is the failure to follow the "critical inquiry" analysis of *Belknap v. Hale,* 463 *U.S.* 491 (1983), which states, " . . . a critical inquiry in applying the *Garmon* rules, where the issue in the litigation is said to be arguably prohibited by the Act and hence within the exclusive jurisdiction of the NLRB, is whether the controversy presented to the state court is identical with that which could be presented to the Board." At 492.

While it is easy for one to understand why the Appellate Division might show a great deal of sympathy toward three employees who claimed to have been deprived of a fair opportunity to present a defense seemingly relevant to a complaint seeking enforcement of fines imposed pursuant to union bylaws for a violation of strike rules, the analysis required to fairly and properly evaluate the contention of these defendant-employees, unfortunately, is not contained within the pages of the state appellate court opinion.

The critical elements of the required analysis are (1) the application of federal pre-emption rules to state court proceedings, (2) the extent to which the facts underpinning the claimed defense of involuntary membership may be presented as an affirmative shield to a recognized common law right to enforce the imposition of union fines, (3) the relative weight that should be given to the interpretation of federal law by federal appeals court versus that by a state court (which, arguably, might have a different focus than a federal court) and (4) the application of court formulated rules (and even statutes of limitations) designated to avert fragmented dispute resolution and untimely proceedings.

Carter v. Sheet Metal Workers International Association, et al., 724 *F. 2d* 1472 (11th Cir. 1984); *Schena v. Smiley,* 401 *A. 2d* 1194, 265 *Pa. Super.* 249 (Super. Ct., Pittsburgh Dist. 1979);

Serrano v. Jones and Laughlin Steel Co. and United Steelworkers of America, et al., 790 *F. 2d* 1279 (6th Cir. 1986) and the critical case for our analysis, *Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, supra,* had the same common thread with the instant case: The activities sought to be regulated through a state court cause of action fall either within the first or second guidelines of *San Diego Building Trades Council v. Garmon,* 359 *U.S.* 236, 79 *S. Ct.* 773 (1959) (Activity either clearly protected by §§ 7 or 8 (b)(1) of the NLRA, 29 U.S.C. §§ 157 and 158 (b)(1), or activity arguably subject to said sections).

Is the complaint that the defendant employees could have submitted to the Board a recognized claim under the NLRA, based on the same facts that are now asserted as a defense to the complaint of the plaintiff union to enforce the imposition of the fines for violation of strike rules by said employees? The thrust of the attack by the defendant employees was aimed at an alleged misrepresentation made by union representatives to them, and an allegation of fraud or misrepresentation has been held to constitute an unfair labor practice. *Electrical Workers (IUE) Local 1507,* 252 *N.L.R.B.* 473, 475-76 (1980). See also *Milk Drivers, supra; Garmon, supra; Serrano, supra,* and *Gardner v. Teamsters Union,* 346 *U.S.* 485, 74 *S. Ct.* 161, (1953). The *Garmon* guidelines alluded to above clearly envelope all unfair labor practice complaints - no exception being established by statute, rule or case law for allegations of fraud or misrepresentation - within the broad umbrella of NLRB jurisdiction, and while both guidelines in *Garmon* are germane to the instant case, specific attention is directed to the statement of the second guideline:

> When an activity is arguably subject to sections 7 or 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. *Garmon, supra,* at 245.

The 11th Circuit has addressed the issue of pre-emption directly:

> The federal pre-emption doctrine provides that a disputant in a labor union controversy cannot file an action in a state court based upon a common law or statutory ground if the facts essential to the state court cause of action are the same as those essential to an unfair labor practice complaint . . . *Carter, supra,* at 1477.

There are limited exceptions, as mentioned by the *Carter* Court, but neither was set forth specifically by the Appellate Division (7a-20a) as a basis for the reversal of the trial court and thus have no applicability to the instant case omnibus incorporation of the *Bridgett* decision, we suggest, does not sufficiently reflect such a determination.

While strict application of the federal pre-emption rules governing presentation of the defenses raised by the defendant employees may seem harsh, nevertheless, neither concerns of equity nor of state law supersede the federal jurisdiction conveyed on the NLRB by the NLRA. Changing the shape of a quart bottle doesn't alter the volume of its contents, and the state courts cannot because, perhaps, of an equitable concern for the corner in which the defendants may find themselves, provide an escape route that conflicts with the federal mandate, especially in an attempted redefinition of the classification of rights purportedly asserted by the defendants.

The New Jersey Supreme Court and Appellate Division, in effect, have adopted for New Jersey the exception apparently carved out of the *Milk Drivers* rule by the Court of Appeals of Indiana ("a more expansive view of jurisdiction", according to the Appellate Division) [14a]; 223 N.J. *Super.* 561, 567 (App.

Div. 1988) in *Communication Workers of America, Local 5900 v. Bridgett, supra,* but Petitioner suggests that the beachhead established by the Indiana court represents nothing more than a sandbar of local resistance to a wave of federal decisions. In particular, petitioner union relies on *Milk Drivers,* which, in view of the denial of certiorari by the U.S. Supreme Court, should serve as the leading authority on the issue of primary jurisdiction and federal pre-emption in the area of unfair labor practices.

In *Milk Drivers,* the 9th Circuit, in a case where the employees, who had been fined for crossing a picket line, argued (1) that they had been fraudulently induced to join the union, (2) that they were not told that they could satisfy membership requirements and retain employment merely by paying dues and (3) that if they had known that all they had to do was pay dues that they would not have joined the union, ruled that the union's dealings with its members relating to union membership was an activity exclusively within the unfair labor practice jurisdiction of the NLRB and, thus, those defenses were pre-empted by the NLRA, stating:

> Consideration of the defense in this case requires the district court to evaluate a union's dealings with employees about union membership. This is conduct closely regulated by sections 7 and 8 of the NLRA. A defense requiring judicial scrutiny of such activity is normally considered to be outside the jurisdiction of the district courts in section 301 contract actions and within the exclusive jurisdiction of the NLRB in the context of unfair labor practice disputes. *Milk Drivers, supra,* at 532.

The appellate courts below, following the *Bridgett* attempt to distinguish itself from *Milk Drivers,* utilized the rubric that the employees in question, because of the alleged fraud of the

union, were not actually members of the union, based on what the court called "constructive resignation". In a nutshell, if the Appellate Division and New Jersey Supreme Court decisions are permitted to stand, New Jersey would be joining Indiana in creating the legal fiction that employees who claim that retained membership in a union is involuntary because of alleged fraud or misrepresentation are not actually members at all. Petitioner union contends that this fiction constitutes nothing more than a jerry-built back door attempt at escaping what the Court may perceive as a harsh result if the federal rules apply.

Thus, the U.S. Supreme Court should resolve the conflict between the New Jersey rulings in the case *sub judice* and *Milk Drivers* and the other federal court decisions construing fraud and misrepresentation as unfair labor practices falling within the purview of §§ 7 and 8 (b) (1) of the NLRA.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

PAUL M. LEVINSON
Attorney for Petitioner

Dated: August 24, 1988

APPENDIX A — OPINON DATED JULY 8, 1988

SUPERIOR COURT OF NEW JERSEY

Chambers of
Judge Donald F. Campbell

Ocean County Court House
C.N. 2191
Toms River, N.J. 08754

July 8, 1988

Laurence A. Hecker, Esq.
109 Division Street
Toms River, New Jersey 08753

Steven J. Abelson, Esq.
c/o Arthur Goldzweig, Esq.
Jode Professional Plaza
193 Route #9 South
Manalapan, New Jersey 07726

Re: Local 827 IBEW vs Trad, Dixon and Simms
Docket No. 85-487-148

Gentlemen:

The following facts and conclusions are rendered in accordance with the decision reached by the Appellate Division and filed on March 11, 1988. Two issues will be addressed. They are: (a) whether or not the union members constructively resigned from the union, or (b) whether or not they were prevented from doing so based upon misrepresentations.

Accordingly, this Court makes the following findings:

1. Although there is no question that union members are

permitted to resign from the union, there is no evidence that any union member was ever informed of that fact or that they had any written notification of their right to resign. There is no evidence that the right to resign is set forth in the constitution, by-laws, or any other written document produced by the union and/or provided to the union members.

2. I find that the testimony of Edna Trad was credible.

a. I find that she was told that: "you had to be a member of the union to work for Bell".
b. I find that Edna Trad was informed that she could not withdraw from the union.
c. I find that if Edna Trad had been aware of the fact that she could withdraw from the union, that she would have done so prior to the strike.
d. I find that Edna Trad did not know that she was permitted to resign and that she did not want to be a member of the union.

3. I find that the testimony of Marjorie B. Simms was credible.

a. I find that Ms. Simms was informed that union membership was "compulsory" and that she believed that she had no choice but to belong to the union.
b. I find that Ms. Simms did not want to be a member of the union.
c. I find that if she had been aware of the fact that she could have resigned, she would have prior to the strike.

Appendix A

d. I find that Ms. Simms first learned that she had a legal right to resign in the month of October, following the strike.

4. I find that the testimony of John T. Dixon was credible.

a. I find that Mr. Dixon would have preferred not to join the union.
b. I find that he believed union membership to be a "condition of employment".
c. I find that Mr. Dixon was unaware of the fact that he could be a "dues-paying non-member".
d. I find that Mr. Dixon would have resigned, prior to the strike, if he was aware of the fact that he had that right.
e. I find that Mr. Dixon did not know he could pay dues, without maintaining union membership.

5. This Court finds that all three employees attempted to obtain information with regard to union membership and were either informed they had no choice but to belong to the union, and were not informed of their right to refuse union membership and continue to work during the strike without subjecting themselves to disciplinary action under the union by-laws.

6. This Court finds that all three employees were misled by the union and were not informed as to the proper procedure for resignation.

7. This Court, therefore, finds that the evidence of membership presented by the union is rebutted and that the employees were not, therefore, members. This

Appendix A

Court, therefore, will not enforce the fine imposed by the union.

8. This Court finds that Ms. Trad, Ms. Simms, and Mr. Dixon were not properly informed of their rights by the union, were misled by the union, and would not have continued their membership in the union had they been properly informed and been aware of the fact that they could: (1) resign their membership prior to the strike, (2) continue to work despite the fact that the union was on strike, (3) continue to accept their salaries, (4) continue to pay dues, and (5) not be subject to disciplinary action by the union.

9. This Court finds that Ms. Trad, Ms. Simms, and Mr. Dixon were prevented from resigning from the union based upon misrepresentations to them by union representatives.

An appropriate order, reflecting this decision, will be drawn by Mr. Abelson.

Very truly yours,

s/ Donald F. Campbell
DONALD F. CAMPBELL, J.S.C.

DFC:r

APPENDIX B — ORDER DENYING PETITION FOR CERTIFICATION FILED MAY 25, 1988

SUPREME COURT OF NEW JERSEY
C-1043 September Term 1987

28,631

LOCAL 827, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Plaintiff-Petitioner,

vs.

EDNA TRAD, et al,

Defendants-Respondents.

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-2440-86T7 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of May, 1988.

s/ Stephen T. Townsend
CLERK OF THE SUPREME COURT

Appendix B

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ Stephen T. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

APPENDIX C — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED MARCH 11, 1988

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2440-86T7

LOCAL 827, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Plaintiff-Respondent,

v.

EDNA TRAD, JOHN T. DIXON AND MARJORIE E. SIMMS,

Defendants-Appellants.

Argued January 4, 1988 — Decided MAR 11 1988

Before Judges J.H. Coleman, Havey and Stern.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County.

Rossie D. Alston, Jr., *pro hac vice*, argued the cause for appellants (Stephen J. Abelson, attorney).

Paul M. Levinson argued the cause for respondent (Laurence A. Hecker, attorney).

The opinion of the court was delivered by

STERN, J.A.D.

Appendix C

Plaintiff Local 827 of the International Brotherhood of Electrical Workers (the Union) filed complaints against defendants Edna S. Trad, John T. Dixon, and Marjorie E. Simms, employees of New Jersey Bell Telephone Company (Bell), seeking to enforce disciplinary fines it imposed on them for strike breaking. In their joint answer, filed after consolidation of the cases, defendants challenged the authority of the union to fine them. They asserted that the Union "failed to advise [them] of their right to resign from Union membership," and in fact "affirmatively and constructively prevented [them] from resigning." In their joint counterclaim, defendants charged that plaintiff "ha[d] engaged in a continual and consistent pattern of harassment and intimidation against the defendants for the sole purpose of insuring strict obedience to its Union decisions."

After a two-day bench trial, the trial judge held that the court lacked "jurisdiction to consider the defense proffered by the defendants." However, the judge found that the court nevertheless had jurisdiction to enforce the fines, and an order was entered to that effect.

On this appeal, defendants challenge the trial judge's conclusion that he did not have jurisdiction to consider the defense. We reverse.

I

Local 827 represents Bell employees in their dealings with the company. The union operates as a modified, "closed shop," which means that Bell employees can become members of the union or can choose to be dues-paying non-members.

Defendants claim that at the time they were hired and

thereafter they were told that union membership was a condition of employment with Bell. Ms. Trad testified that when she transferred from Southern Bell to New Jersey Bell, she was approached by a union representative, who asked her to sign a union card and who told her that she had to be a member of the union in order to work for the company. Ms. Simms related a similar story to the effect that she was told by the same union representative, "[i]f you want to work here, you sign the card." Mr. Dixon testified that he also was told by a different union representative that union membership "was a condition of employment." All three defendants testified that they would not have joined or would have resigned from the union if they knew they had the right to do so or to become dues-paying non-members.

In 1983, the union voted in favor of a strike against Bell.[1] The strike lasted from August 8, 1983 to August 26, 1983. By letter dated August 11, 1983, defendants were formerly informed by the union delegate that the strike against the Bell System was "on," that it was their "obligation. . . not [to] report to work," and that if they did work, "charges" would be brought against them pursuant to the union's constitution. At that point, defendants separately inquired as to the possibility of resigning from the union. They claim they were again told that union membership was a condition of their employment. Thereafter, they each decided to cross the picket line and work during the strike.

Following the strike, in September of 1983, the union brought charges against defendants for violating union provisions against

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1. The three defendants entered an appearance to vote against the strike.

working during a strike. After the matter was tried by the union, each defendant was fined in the amount of 80% of their base salary earned during the strike, an amount estimated to be their take-home pay for that period. The union sought judicial enforcement of its decision after the defendants refused to pay the fines.

As noted above, following trial, the trial judge ruled that the court lacked "jurisdiction to consider the defense proffered by the defendants." Relying primarily on *Milk Drivers & Dairy Employees Union v. Vevoda*, 772 *F.*2d 530 (9th Cir. 1985),*cert.* den. 475 *U.S.* 1036, 106 *S.Ct.* 1246, 89 *L.Ed.* 2d 354 (1986), the judge stated:

> This Court finds that the doctrine of primary jurisdiction which recognizes the intent of Congress to have matters of national labor policy decided in the first instance by the NLRB, applies here.

The judge, however, found that the court nevertheless maintained jurisdiction to enforce the fines. The judge ordered that execution of the judgment "be withheld for 30 days in order for the defendants to petition the National Labor Relations Board for relief." Plaintiff was permitted to execute on the judgment if the defendants did not file complaints with the NLRB within that period or if the complaints were dismissed.[2]

---

2. The parties appear to agree that, even if the imposition of the fines itself constituted an unfair labor practice independent of the advice given concerning the obligation to join the union and the inability to resign, the time for filing a complaint with the National Labor Relations Board had run by the time the trial court rendered its opinion.

Appendix C

The defendants argue that unions can only discipline voluntary members, and that since their membership was never voluntary, they cannot be subjected to the fines imposed. They assert that their membership was involuntary because they were never advised that they could pay dues to the union without becoming members and without jeopardizing their employment, as permitted by federal law. *See, e.g., NLRB v. General Motors Corp.*, 373 *U.S.* 734, 83 *S.Ct.* 1453, 10 *L.Ed.*2d 670 (1963); *United Stanford Employees, Local 680 v. NLRB*, 601 *F.*2d 980 (9th Cir. 1979); *NLRB v. Hershey Foods Corp.*, 513 *F.*2d 1083, 1084-1087 (9th Cir. 1975).

The union argues that state jurisdiction to hear the defense of involuntary membership is pre-empted by the jurisdiction of the NLRB. It also contends that no misrepresentations were made to the defendants. However, the judge made no fact-findings because of his decision on jurisdiction.

The union relies on *Milk Drivers & Dairy Employees Union v. Vevoda, supra.* As in this case, *Vevoda* was "an action by a union to collect fines levied against three of its members who violated the union's bylaws by working behind a picket line during a strike." 772 *F.*2d at 531. As in this case, in *Vevoda*:

> Defendants argued they had been fraudulently induced to join the union. They were told that, pursuant to a valid union security provision in the collective bargaining agreement, they had to become union members as a condition of employment, and they were not told that under recent case law, the membership requirements could be satisfied by merely paying dues. [772 *F.*2d at 531].

Appendix C

As in this case, in *Vevoda*:

> All three defendants stated that they had never been told by any union representative that they could retain employment by merely paying dues and other fees. Further, they have all stated that if they had known that they did not have to become full-fledged union members, they would not have become members of [the] Local. However, none of the defendants . . . alleged that the union ever threatened to fire him if he did not become a full-fledged member.
> [*Id.* at 532].

In *Vevoda*:

> there [was] no dispute that the defendants had joined the Local and were regarded as members in good standing until the time the fines at issue were levied, that they at no time questioned the terms of their membership, and that they never sought to resign full-fledged membership. [*Id.*].

The Court of Appeals held that the District Court lacked jurisdiction to consider the defenses related to the union's fraudulent inducement of plaintiffs to join and remain in the union:

> Consideration of the defense in this case requires the district court to evaluate a union's dealings with employees about union membership. This is conduct closely regulated by sections 7 and 8 of the NLRA. A defense requiring judicial

> scrutiny of such activity is normally considered to be outside the jurisdiction of the district courts in section 301 contract actions and within the exclusive jurisdiction of the NLRB in the context of unfair labor practice disputes. [citations omitted].
>
> This doctrine, which is known as the doctrine of primary jurisdiction, recognizes the intent of Congress to have matters of national labor policy decided in the first instance by the NLRB. [citation omitted]. The Supreme Court has stated: 'As a general rule, federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA]' . . . .' *Kaiser Steel Corp. v. Mullins*, 455 *U.S.* 72, 83, 102 S.Ct. 851, 859, 70 *L.Ed.*2d 833 (1982) (quoting [*San Diego Building Trades Council v. Garmon*, 359 *U.S.* 236, 79 *S.Ct.* 773, 3 *L.Ed.*2d 775 (1959)] 359 *U.S.* at 245, 79 *S.Ct.* at 780, 3 *L.Ed.*2d 775). *Application of the doctrine of primary jurisdiction in this case would require reversal because the district court lacked jurisdiction to consider the defense proffered by the defendants.*
> [*Id.* at 532-533 (emphasis supplied)].[3]

The court rejected the argument that the case fell within the exception to the pre-emption doctrine which permits a court to interpret terms in a collective bargaining agreement, because it

---

3. Sections 7, 8 and 301 of the National Labor Relations Act are codified at 29 U.S.C. §§ 157, 158 and 185, respectively.

characterized the defense raised as "not the illegality of any contractual provision, but an attempt to 'avoid the entire agreement.' " *Id.* at 533 (quoting *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors*, 689 *F.*2d 1339, 1343 (9th Cir. 1982)). Finally, the court ruled that even if jurisdiction were not pre-empted, the defendants' assertions had no factual support in the record.

More recently, the Court of Appeals of Indiana took a more expansive view of jurisdiction. *See Communications Workers of America, Local 5900 v. Bridgett*, 512 *N.E.*2d 195 (Ind. Ct. App., 1st Dist. 1987). In that case, the union again argued "that the trial court was without jurisdiction to determine the membership of the Employees. Specifically, the Union argue[d] that the doctrine of primary jurisdiction places resolution of these issues within the exclusive jurisdiction of the National Labor Relations Board (NLRB)." 512 *N.E.*2d at 197. The case concerned Indiana Bell Telephone employees who crossed the picket lines during the same August 1983 strike as that involved in this appeal. There:

> The Union presented evidence that the Employees were enrolled as members when they crossed the picket lines and worked during the strike. The Employees [on the other hand] presented evidence that prior to the strike they resigned and were no longer card carrying members when they crossed the picket lines. Several employees testified that they resigned by tendering oral or written resignations. *Others testified that when they attempted to obtain information on the proper resignation procedure they were told either that they could not resign or that the time period for resignation had passed.* [*Id.* at 197 (emphasis supplied)].

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The Court of Appeals concluded that the doctrine of primary jurisdiction did not preclude the state court from entertaining the defense:

> The doctrine of primary jurisdiction relied upon by the Union arises out of the United States Supreme Court's interpretation of the National Labor Relations Act (NLRA). *San Diego Building Trades Council v. Garmon* (1959), 359 *U.S.* 236, 79 *S.Ct.* 773, 3 *L.Ed.*2d 775. In *Garmon* the Supreme Court held that Congress intended that matters of national labor policy be decided in the first instance by the NLRB. To protect this intent the Supreme Court provided, that as a general rule, federal courts do not have jurisdiction over activity which is "arguably subject to § 7 or § 8 of the National Labor Relations Act." *Garmon*, at 245, 79 *S.Ct.* at 780, 3 *L.Ed.*2d at 783.
>
> The general rule of primary jurisdiction, however, has not been given a broad mechanical application to bar all suits or defenses that arise in labor relations cases from being decided by the courts. *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters* (1978), 436 *U.S.* 180, 188-89, 98 *S.Ct.* 1745, 1753, 56 *L.Ed.*2d 209, 220. The doctrine is limited to its primary justification which is the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose. *Vaca v. Sipes* (1967), 386 *U.S.* 171, 180-81, 87 *S.Ct.* 903, 912, 17

> *L.Ed.*2d 842, 852; [citations omitted]. Therefore, unless the Congressional intent of keeping the area of labor relations uniform is placed in jeopardy, the doctrine is inapplicable. [512 *N.E.*2d at –].

The court further concluded:

> The doctrine of primary jurisdiction does not apply to the present case. The issue which was raised by the Employees as a defense merely involves the contractual question of whether they were parties to the contract and members of the Union at the time of the strike. This issue is not one that involves an activity that is arguably protected by § 7 or prohibited by § 8 of the NLRA. The defense of non-membership and resignation was purely a contractual issue and merely a negative response to the Union's affirmative burden of establishing that the Employees were parties to the contract that the Union was trying to enforce. The doctrine of primary jurisdiction does not apply to preempt the court's jurisdiction to interpret and enforce contracts. *Kaiser Steel*, 455 *U.S.* at 83-84, 102 *S.Ct.* at 859-60, 70 *L.Ed.*2d at 843-44. The court interpreted the present contract to cover only members of the Union. The Constitution specifically provided that only members may be fined. If the Union failed to establish that the Employees were members of the Union during the days they worked behind picket lines, then the court could not enforce the fines the Union imposed under the Constitution. Thus, the trial court was required to determine the membership

> status of the Employees. The issue of membership status *vel non* is not covered by sections 7 or 8 of the NLRA, and accordingly, not preempted by the doctrine of primary jurisdiction. Therefore, the defense raised by the Employees was within the trial court's jurisdiction. [*Id.* at 198].

Finally, the Court of Appeals also held:

> . . . that the trial court had jurisdiction to hear the defense of membership and resignation even if the defense arguably involves an issue of unfair labor practice governed by sections 7 and 8 of the NLRA. When a labor dispute involves both a breach of contract and an unfair labor practice charge, the NLRB and the courts have concurrent jurisdiction to resolve the dispute. [citations omitted]. This rule is especially applicable when the unfair labor practice charge is peripheral to the determination of the contract charge. [citations omitted]. The critical inquiry in applying the doctrine of primary jurisdiction is whether the controversy presented to the state court is identical with that which could be presented to the NLRB. *Belknap Inc. v. Hale* (1983), 463 *U.S.* 491, 510, 103 *S.Ct.* 3172, 3183, 77 *L.Ed.*2d 798, 814. Also, the rule in *Garmon* is relaxed 'when the state court can ascertain the actual legal significance under federal labor law by reference to compelling precedent applied to essentially undisputed facts.' *Garmon*, 359 *U.S.* at 245, 79 *S.Ct.* at 780, 3

> *L.Ed.*2d at 783. Thus, when the uniformity of federal labor law is not jeopardized, the courts may resolve a dispute even though it arguably is covered by sections 7 and 8 of the NLRA. *Sears, Roebuck and Co.*, 436 *U.S.* at 188-89, 98 *S.Ct.* at 1753, 56 *L.Ed.*2d at 220. [*Id.*at 198-199].

As established labor law precluded the imposition of fines by unions against non-members, the court ruled that "if the Employees actually or constructively resigned from the Union, then the court could not enforce the Union's imposition of fines." *Id.* at 199 (citations omitted). It also held that the state courts maintained jurisdiction to make this determination.

As noted above, in *Bridgett*, some employees "presented evidence that prior to the strike they resigned and were no longer card carrying members when they crossed the picket lines. Several employees testified that they resigned by tendering oral or written resignations." 512 *N.E.*2d at 197. On this basis, the Indiana Court of Appeals distinguished *Vevoda* because of language in the Ninth Circuit opinion that:

> For purposes of this appeal, there is no dispute that the defendants had joined the Local and were regarded as members in good standing until the time the fines at issue were levied, that they at no time questioned the terms of their membership, and that they never sought to resign full-fledged membership. [772 *F.*2d at 532].

The distinction resulted because the crux of the defense in Indiana was that the employees "were not members and had resigned prior to the strike." 512 *N.E.*2d at 200. While the evidence in our case

cannot be so interpreted, defendants testified that they would have resigned if they knew they could do so without losing their jobs. In fact, they assert that they did not do so only because of defendant's unfair labor practice in misrepresenting their obligation to remain union members. Thus, in this respect, this case may involve constructive resignation as in *Bridgett* because "the members alleged and have shown that they resigned *or were misled from resigning*." 512 *N.E.*2d at 200 (emphasis supplied). However, we do not decide this case on the basis of a distinction between employees who resigned and those who did not. In *Bridgett*, in addition to the employees who resigned, "[o]thers testified that when they attempted to obtain information on the proper resignation procedure they were told either that they could not resign or that the time period for resignation had passed." 512 *N.E.*2d at 197. Even those who remained members because of advice that they could not resign were permitted to assert their defense of an unfair labor practice based on that advice. The defendants in this case were treated similarly to those employees by the union and should be treated similarly to them by the courts. In fact, defendants in this case assert the very defense which gave rise to a finding of "constructive resignation" in *Bridgett*. As in *Bridgett*:

> The defense in the present case . . . differs from the defense in *Vevoda*. In *Vevoda* the members argued that they were fraudulently induced to join the union. *Id.* at 531. The court determined, however, that no misrepresentations were made. *Id.* at 533. *In the present case, the members alleged and have shown that they* resigned or *were misled from resigning*. Furthermore, the Employees in the present case are not attempting to void an agreement, but are merely arguing that the Union

> failed to establish that they were members. Such a defense is merely the converse to the Union's burden of proof on membership which must be met before fines can be imposed. Thus, the rationale of *Vevoda* does not apply to the present case; the doctrine of primary jurisdiction does not preempt the trial court's jurisdiction; and the trial court properly addressed the Employees' defense. [*Id.*at 200 (emphasis supplied)].

We agree with the approach taken by the Court of Appeals of Indiana. If the union seeks to enforce the fine in the courts of New Jersey in circumstances where the employees assert involuntary membership allegedly flowing from misrepresentations relating to their obligation to remain in the union, the defense must be considered on the merits.

Accordingly, the judgment is reversed and the matter is remanded for fact-finding and conclusions as to whether plaintiffs had constructively resigned from the union or were prevented from doing so based on misrepresentations. We do not retain jurisdiction.

I hereby certifiy that the
foregoing is a true copy of
the original on file in my office.

s/ Jack G. Trubenbach
Clerk of the Appellate Division

APPENDIX D — ORDER DISMISSING COUNTERCLAIMS NUNC PRO TUNC ENTERED JUNE 8, 1987

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO. 85-2804-151

Civil Action

LAURENCE A. HECKER, P.C.
109 Division St.
Toms River, N.J. 08753
(201) 244-5684
Attorney for Plaintiff

LOCAL 827 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Plaintiff,

vs.

JOHN T. DIXON,

Defendant.

Appendix D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO. 85-487-148

LOCAL 827 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Plaintiff,

vs.

EDNA S. TRAD,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO. DC-54-6307-85

LOCAL 827 INTERNATION BROTHERHOOD OF ELECTRICAL WORKERS,

Plaintiff,

vs.

MARJORIE E. SIMMS,

Defendant.

This matter being opened to the Court by Laurence A. Hecker, Esq., of the firm of Laurence A. Hecker, A Professional Corporation, counsel for Plaintiff, with the consent of Steven J. Abelson, Esq., of the firm of Arthur Goldzweig, Esq., counsel

Appendix D

for defendants, and it appearing that the order for judgment entered on October 6, 1987 omitted any reference to the dismissal of the counterclaim, same having been implied by the letter opinion of the Court, and it further appearing that to complete the record for the pending appeal that this Order be entered:

IT IS on this 8th day of June, 1987,

ORDERED that judgment shall enter nunc pro tunc dismissing the counterclaims of the defendants herein.

s/ Donald F. Campbell
DONALD CAMPBELL, J.S.C.

Consent is hereby given
to the entry of the within order.
Arthur Goldzweig, Esq.
Attorney for defendants
By: s/ Steven J. Abelson
STEVEN J. ABELSON, ESQ.

APPENDIX E — ORDER FOR JUDGMENT ENTERED OCTOBER 6, 1986

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO. 85-2804-151

CIVIL ACTION

LAURENCE A. HECKER, P.C.
109 DIVISION STREET
TOMS RIVER, NEW JERSEY 08753
(201) 244-5684
ATTORNEY FOR PLAINTIFF

LOCAL 827 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

PLAINTIFF,

VS.

JOHN T. DIXON,

DEFENDANT.

Appendix E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO. 85-487-148

LOCAL 827 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

PLAINTIFF,

VS

EDNA S. TRAD,

DEFENDANT.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO. DC-54-6307-85

LOCAL 827 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

PLAINTIFF,

VS.

MARJORIE E. SIMMS,

DEFENDANT.

This matter being opened to the Court by Laurence A. Hecker, Esq., of the firm of Laurence A. Hecker, A Professional Corporation, counsel for Plaintiff, in the presence of Steven J. Abelson, Esq., of the firm of Arthur Goldzweig, Esq., counsel for defendants, and following a trial in this matter and

consideration of various applications by the parties, and for good cause shown;

It is on 6th day of October, 1986 ORDERED that judgment shall enter against the defendants Edna S. Trad in the amount of $942.00, against John T. Dixon in the amount of $1136.40 and Marjorie E. Simms in the amount of $942.00 together with interest and cost of suit; and

IT IS FURTHER ORDERED that the judgments herein entered are based upon the reasons set forth in the letter of the Court to counsel dated April 8, 1986; and

IT IS FURTHER ORDERED that execution of the said judgments shall be withheld for 30 days in order for the defendants to petition the National Labor Relations Board for relief from said judgments, but if complaints are not filed with the NLRB by any of the defendants within 30 days or if such complaints thereafter are dismissed by the NLRB, then the plaintiff may execute against any and all of the defendants on said judgments; and

IT IS FURTHER ORDERED that the defendants are enjoined against transferring or disposing of any assets with an intent to avoid satisfaction of said judgments, retroactive to August 14, 1986; and

The time for appeal is hereby tolled pending disposition of the NLRB complaints, provided that in the absence of the filing of any such complaint the date for appeal will run from the date of entry of this order for judgment.

s/ Donald F. Campbell
DONALD F. CAMPBELL, J.S.C.

APPENDIX F — DECISION DATED APRIL 8, 1986

SUPERIOR COURT OF NEW JERSEY

Chambers of
Judge Donald F. Campbell

Ocean County Court House
C.N. 2191
Toms River, N.J. 08754

April 8, 1986

Laurence A. Hecker, Esq.
109 Division Street
Toms River, New Jersey 08753

Steven J. Abelson, Esq.
45 North Main Street
Marlboro, New Jersey 07746

Re: Local 827 v. Trad
Docket No. 85-487-148
Consolidated with
Local 827 v. Dixon (#85-2804-151) and
Local 827 v. Simms (#DC 54-6307-85)

Gentlemen:

This letter will constitute my decision in the above captioned matter.

STATEMENT OF FACTS

The three defendants in this matter are employed by New Jersey

Bell Telephone. It is alleged that all three were specifically told, upon their employment, by various officials of the plaintiff, that membership in the IBEW Local #827 was required. They further testified that although they were not pleased with the requirement, they weren't aware that they had a right to resign and still retain their employment. In 1983, there was a strike against Bell Telephone. The defendants each crossed the picket line and informed their union officials of their disagreement with the strike. There was testimony that they were harrassed and they never the less performed their jobs. Following the strike, the union filed charges against all three defendants, who were notified that there would be a hearing. It was at that time that the defendants first discovered that they had a right to resign from the union and could have, if they had resigned, crossed the picket lines and continued their employment. Subsequently, all the defendants resigned, however, the union continued to hold its hearing and assessed fines against all three defendants.

The plaintiff union cites the case of *Milkdrivers & Dairy Employer's Union, Teamsters Local #302 v. Craig Vevoda, Kenneth Chamness & Mark Sottana*, #84-2282 (9th Circuit 1985). The case was decided by the U.S. Court of Appeals for the 9th Circuit. It appears to this Court that the facts of the *Milkdriver's & Dairy Employees Union* case is almost identical to the instant case.

In that case, the Court found that this type of case is normally considered to be within the exclusive jurisdiction of the National Labor Relations Board. There are facts which distinguish one case from the other, however, they are very few and, essentially, it is this Court's opinion that the cases are almost identical.

This Court finds that the doctrine of primary jurisdiction which

recognizes the intent of Congress to have matters of national labor policy decided in the first instance by the NLRB, applies here. I, therefore, find that this Court lacks jurisdiction to consider the defense proffered by the defendants.

As I have discussed on the telephone with both attorneys, this does not resolve the issue with regard to payment of the fines levied by the union. I know Mr. Hecker's position is that this Court should require the fines be paid and since the defense raised by the defendants is not available to them, that a decision can be reached requiring all the defendants to pay the fines assessed. Mr. Abelson, on the other hand, maintains that the entire controversy should be placed in front of the NLRB if I am to refuse to consider the defenses raised.

I will give Mr. Abelson until April 21, 1986 to forward a letter with any authority he may have to support his position and then require Mr. Hecker to respond on or before May 12, 1986.

Until this issue is resolved, there is no need to prepare an order.

Very truly yours,

s. Donald F. Campbell
DONALD F. CAMPBELL, J.S.C.

APPENDIX B

LETTER FROM CLERK OF THE SUPREME COURT TO PAUL M. LEVINSON, ESQ., REFUSING TO DOCKET PETITION FOR A WRIT OF CERTIORARI AS FILED JURISDICTIONALLY OUT OF TIME

August 29, 1988

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C. 20543

August 29, 1988

Mr. Paul M. Levinson, Esq.
2460 Lemoine Avenue
Fort Lee, New Jersey 07024

RE: LOCAL 827, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. EDNA TRAD, et al.

Dear Mr. Levinson:

Per our phone conversation today, your petition for writ of certiorari which was mailed August 24 and received August 25, 1988 may not be docketed, because it was submitted out of time. Enclosed are 39 copies of the petition, and your check in the amount of $200.00. See U.S.C. 2101(c), and Rules 20 and 28.2 of the Rules of the Supreme Court.

A petition for writ of certiorari in a civil matter must be received or placed in the U.S. mail on or before the 90th day following judgment or denial of a petition for rehearing. Therefore, the petition must have submitted on or before August 23, 1988 to be considered timely.

I have retained one copy of the petition and correspondence.

Very truly yours,

JOSEPH F. SPANIOL, JR., CLERK

By

Suzy McDivitt
Assistant Clerk

cc: Steven J. Abelson, Esq.
Rossie D. Alston, Jr., Esq.
Clerk, Superior Court of New Jersey,
Appellate Division (No. A-2440-86T7)